Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 1977

77-141

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Petitioners,

VERSUS

LAWRENCE MOCH, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

JOHN F. WARD, JR.,
ROBERT V. McANELLY,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of The United States:

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, rendered on March 11, 1977.

CITATIONS TO OPINIONS BELOW

The decision of the District Court is unreported and

is printed as Appendix "A" hereto, page 17, the decision of the Circuit Court of Appeals is printed as Appendix "B" hereto, page 20, and is reported at 548 F.2d 594.

JURISDICTION

Judgment of the District Court was entered on March 12, 1975. The judgment of the Court of Appeals was entered on March 11, 1977. Rehearing was denied on April 27, 1977. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Did the Court below err in reversing the District Court's application of the traditional doctrines of res judicata and collateral estoppel in this case?

STATUTES INVOLVED

The statutes and constitutional provisions involved in this case are the Fourteenth and Fifteen Amendments to the Constitution of the United States of America; 42 U.S.C. 1973(c); Louisiana Revised Statutes, Title 17, Section 71.1 through 71.6 (Louisiana Act No. 561 of (1968); La. Act 158 of 1946; and La. Act 122 of 1977.

STATEMENT OF THE CASE

This is the second attempt by the same plaintiffs, representing the same class, based upon virtually identical allegations, and represented by the same attorneys, to have the reapportionment plan of the East Baton Rouge Parish School Board declared invalid by the Federal Courts on grounds of discriminatory dilution of

minority voting interests even though the School Board had voluntarily carried out its responsibility and properly reapportioned itself in accordance with applicable decisions of this Court and in accordance with the procedures set forth in Section 5 of the Votings Rights Act of 1965.

The first law suit entitled *Bryant, et al. v. East Baton Rouge Parish School Board, et al.*, was filed in May 1972 and dismissed by the District Court for failure to state a claim upon which relief could be granted on July 26, 1972. Plaintiffs appealed that decision to the Fifth Circuit Court of Appeals which affirmed the decision of the District Court in a per curiam opinion (No. 72-3075) on February 9, 1973. Plaintiffs filed a petition for rehearing and for rehearing en banc which was denied by the Court of Appeals on March 19, 1973. No petition for certiorari to this Court was filed.

The present second complaint was filed on October 10, 1974 and was virtually identical, in all respects, to the first complaint. This second complaint was dismissed by the District Court as being barred by the doctrines of res judicata and collateral estoppel on March 12, 1975. On March 11, 1977 the Court below rendered its decision carving out an exception to the historical and traditional doctrines of res judicata and collateral estoppel for this case and reversing and remanding to the District Court directing that Court as follows:

> "Therefore, we direct the District Court to determine on remand: (1) whether a change in the applicable law clearly has occurred since 1972, thus rendering incorrect the legal principles under which the District Court determined the case in 1972 and (2)

assuming such a change has occurred, whether application of traditional res judicata principles would cause manifest injustice. If it answers both questions in the affirmative, neither bar nor collateral estoppel should preclude the present action. . . ."

In 1946, the East Baton Rouge Parish School Board consisted of seven members with four members elected at-large from the first, second, third, sixth and ninth Wards and three elected at-large from the fourth, seventh, eighth and tenth Wards. See Act 158 of 1946. In 1946 the Constitution of Louisiana was amended so as to permit the submission to the people of East Baton Rouge a plan of government which would combine the operations of the government of the City of Baton Rouge and the government of the Parish of East Baton Rouge. See Louisiana Constitution of 1921, Article XIV, Section 3 (a). This new plan of government (commonly known as the City-Parish government) divided the Parish into only three Wards with Ward 1 being the city limits of the City of Baton Rouge, Ward 2 being the rest of the Parish to the north and northeast of the City and Ward 3 being the balance of the Parish to the East and South of the City. This plan of government provided for the election of seven members of the City-Parish council from Ward 1 and one member each from Wards 2 and 3.

At the same time, the East Baton Rouge Parish School Board was also reorganized with a total of seven members with five elected from Ward 1 and one each from Wards 2 and 3. This reorganization was maintained in effect until 1960 when the Louisiana Legislature increased the size of the East Baton Rouge Parish School

Board to eleven members with seven elected from Ward 1 and two each from Wards 2 and 3. See L.R.S. 17:58.

Thereafter, by Act 561 of 1968 (L.R.S. 17:71.1–71.6) the Legislature authorized and directed all School Boards in Louisiana to reapportion themselves every ten years based upon the Federal census and beginning with the census of 1970. As soon as the official 1970 Federal census figures became available in 1971, the East Baton Rouge Parish School Board voluntarily proceeded to reapportion itself. After a series of public hearings at which both multi-member and single-member districts were discussed, the School Board voted to adopt a reapportionment plan which called for twelve members, seven to be elected at-large from Ward 1, three to be elected at-large from Ward 2, and two to be elected at-large from Ward 3. This plan had a maximum minus deviation of only 4.1% and a maximum plus deviation of only 3.26% for a maximum deviation spread of only 7.36%, well within constitutional requirements as enunciated by decisions of this Court. This reapportionment plan was given wide newspaper publicity at the time and plaintiffs in this case were well aware of such proposed reapportionment plan.

The School Board then immediately complied with the requirements of Section 5 of the Voting Rights Act of 1965, 42 USC 1973(c) by submitting same to the Attorney General of the United States on October 20, 1971 for a determination that such reapportionment plan ". . . does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . .". Such Section 5 submission

was also given wide newspaper publicity and plaintiffs could have, and presumably did, lodge an objection to such proposed reapportionment plan with the Attorney General. However, the Attorney General found the plan to be nondiscriminatory as he responded by letter dated December 27, 1971 advising that he did not interpose any objection to such plan.

Although the Attorney General's approval was received in December, 1971, plaintiffs waited until May, 1972, after candidates had qualified for School Board elections, before filing their first complaint. As noted heretofore, that first complain was dismissed by the District Court with such dismissal being affirmed on appeal by the Fifth Circuit Court of Appeals. The second present complaint was filed in 1974 after two of the named plaintiffs were unsuccessful in election bids to the School Board from Wards 1 and 2.

Although it is true, as alleged, that no black citizen has ever been elected to the East Baton Rouge Parish School Board, there are certain other facts pertinent to this case which bear consideration by this Court. This is not a case where the School Board has changed from single-member districts to at-large districts for election of its members. School Board members in East Baton Rouge Parish have been elected at-large at least since 1946.

Furthermore, although it is true that no black citizen has ever been elected to the East Baton Rouge Parish School Board, a black citizen has been elected to the City-Parish Council under the identical at-large system, having been one of seven members elected at-large from Ward 1. That black City Council member is now a member of the State Legislature.

In addition, a black citizen from Ward 2 won the democratic primary and nomination for School Board member in 1972 when Louisiana still had the two-party system and obtaining the democratic nomination was tantamount to election. However, this black citizen was defeated in the general election by a republican. It must be noted however, that in that same year a white incumbent democratic member of the Legislature from East Baton Rouge Parish was also defeated in the general election by a Republican.

With respect to two of the named plaintiffs who were unsuccessful candidates in 1974, one seeking election in Ward 2 came very close to winning over a former principal who also had many years service in civic organizations and community projects in that Ward. The unsuccessful plaintiff candidate in Ward 1 was a candidate for the unexpired portion of a term on the School Board to which he had been appointed by the Governor after his name was submitted by the School Board. He ran first in the first primary in a special election to fill that unexpired term. During the second primary, the Governor of the State of Louisiana and the Mayor of the City of Baton Rouge and Parish of East Baton Rouge sponsored a widely publicized cocktail party at a local hotel in support of his candidacy. The citizens of Baton Rouge have historically resented the mayor, and particularly the Governor of the State, getting involved in supporting candidates for local offices. Plaintiff's oppo-

nent seized upon this resentment to make such interference a paramount issue in the second primary.

In addition, many of the criteria which this Court has discussed as being indicative of discriminatory procedures or devices against minorities such as anti-singleshot voting, the two-primary system, etc. which were part of Louisiana's election laws in the past, no longer exist. We now have only an open primary and general election.

Furthermore, a black citizen from Ward 2 was recently elected Constable running at-large in a District in which five were to be elected, winning head-to-head over a white opponent in the general election.

It must also be noted that since the Attorney General approved this reapportionment plan in accordance with the 1965 Voting Rights Act, elections have been held for School Board in 1972, 1974, and 1976 in which many citizens of East Baton Rouge Parish offered themselves for public service on their local School Board. Twelve of those citizens have been elected to the School Board and the terms of office of most of them do not expire until 1980 or 1982.

Their decision to run was made, and their election held, not only after the approval by the United States Attorney General but after the subsequent approval of this reapportionment plan or method of electing School Board members, by both the United States District Court and the Fifth Circuit Court of Appeals. They also have important vested rights in their public office which the doctrines of res judicata and collateral estoppel should protect.

In addition, the Louisiana Legislature at its just completed 1977 session, adopted Act 122 of 1977 which requires this School Board to reapportion itself, based upon the 1980 Federal census, into single-member districts to be effective for the election in 1982 for all School Board members. This action by the Legislature is another reason why the present School Board members should not be now divested of the public office which they have fairly won.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court below in the instant case reversing the District Court's application of the doctrines of res judicata and collateral estoppel in this case has decided an important federal question regarding the finality of decisions of the Federal Courts and stability in the judicial process in apparent conflict with applicable decisions of this Court in *Sunshine Anthracite Coal Company v. Adkias*, 310 U.S. 381; *Chicago, R.I.P.RY. v. Schendel*, 270 U.S. 611; and *Baltimore SS Company v. Phillips*, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069.

The decision of the Court below would also appear to be in apparent conflict with decisions of other circuits and other decisions of the Court below in *Acree v. Airline Pilots Association*, 390 F.2d 199 (5th Cir., 1968); *Carr v. United States*, 507 F.2d 191 (5th Cir., 1975); *Hammell v. Equitable Life Assurance Society*, 151 F.2d 994 (7th Cir., 1945); *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir., 1973); *Wilson Cypress Company v. Atlantic Coastline R.R.*, 109 F.2d 623 (5th Cir.) cert. denied 310

U.S. 653 (1940); *Moreno v. Marbil Productions, Inc.*, 296 F.2d 543 (2nd Cir., 1961) and *Rhode v. Jones*, 351 F.2d 884 (8th Cir., 1965) cert. denied 383 U.S. 919, rehearing denied 383 U.S. 963 (1965).

The cited cases support the proposition that the doctrines of res judicata and collateral estoppel recognize that endless litigation leads to confusion or chaos. The interest of the proper administration of justice is best served by limiting parties to one fair trial of an issue or cause. Public policy in support of these doctrines rests on the proposition that litigation ultimately must end and become conclusive as to the matters in contention between the parties to a suit. It recognizes the necessity of repose among the parties and the Courts, as well as the inequity of subjecting one party to the burdens of repetitious litigation.

In the context of this case, those doctrines should also recognize the need for stability in government. Those doctrines should protect the right to public office gained by citizens who are willing to submit themselves as candidates therefor in reliance on the decision of the highest legal officer in the United States Government and the final decision of the United States District Court and the Court of Appeals.

The Court below has attempted to fit this case into those cases which have, only occasionally, been declared exceptions to the basic rules of res judicata and collateral estoppel.

The Court below has basically held that there may have been a significant change in the law since the District Court's original decision in 1972 and its affirmance

by the Court below in 1973, affirming the constitutionality of the present method of electing School Board members in East Baton Rouge Parish.

The Court below, after citing many of the above cases in reaffirming the validity of the doctrines of res judicata and collateral estoppel, basically cited three cases as justification for a possible exception to these doctrines in a case involving constitutional claims. These cases are *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971) involving Legislative reapportionment; *Bronson v. Board of Education*, 525 F.2d 344 (6th Cir., 1975) cert. denied, 425 U.S. 934, 96 S.Ct. 1665, 48 L.Ed.2d 175 (1976) involving school desegregation; and *Griffin v. State Board of Education*, 296 F.Supp. 1178 (Eastern District of Virginia, 1969) also involving school desegregation. However, the *Bronson* and *Griffin* cases involving school desegregation are cases in which the District Courts retain jurisdiction even after judgment, as directed by this Court in *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, and judgments in those cases are, therefore, not final judgments which would invoke the doctrines of res judicata and collateral estoppel. And, although the *Whitcomb* case does seem to support the position of the Court below declaring that the instant case may be such an exception to these doctrines if there has been a clear change in the law, there has been no clear or significant change in the law involved in this case as to whether multi-member districts are constitutional. There has, of course, been a clear change in the law with respect to permissible deviation from the one man—one vote rule which was involved in the *Whitcomb* case.

Petitioners would respectfully submit that there is no decision of this Court, commencing with *Reynolds v. Simms*, 377 U.S. 533, (1964); *Burns v. Richardson*, 86 S.Ct. 1286, 384 U.S. 73; *Fortson v. Dorsey*, 379 U.S. 433 (1965) and through and including *Gaffney v. Cummings*, 412 U.S. 735 (1973); *White v. Regester*, 412 U.S. 755, (1973); *East Carroll Parish School Board v. Marshall*, 47 L.Ed.2d 296, 96 S.Ct. 1083, (1976); *Beer v. United States*, 96 S.Ct. 1357, 47 L.Ed.2d 629, (1976); *Chapman v. Meier*, 420 U.S. 1, (1975); *Wallace v. House*, 425 U.S. 947, (1976) and *Connor v. Finch*, No. 76-777, ___ U.S. ___, 45 USLW 4528 which hold multi-member districts to be per se unconstitutional. In fact most of those cases continue to reiterate that this Court has not so held.

The only decisions of this Court which have restricted the use of multi-member districts in the election of public officials are those decisions such as *East Carroll*, supra; *Connor v. Johnson*, 402 U.S. 690, (1971); *Wallace v. House*, supra; *Chapman*, supra; and decisions of the Court below in some of those same cases as well as *Kirksey v. Board of Supervisors of Hinds County*, No. 75-2212, ___ F.2d ___ (decided May 31, 1977) which hold *only* that when a governing authority refuses to reapportion itself and the Federal Courts are required to do the reapportioning, the District Court should prefer single-member districts over multi-member districts, or, as was held in *East Carroll*, should impose single-member districts unless the District Court can find circumstances which make multi-member districts more preferable.

We would point out however that this case does not

involve a "court-ordered" reapportionment plan. Although some other school boards in Louisiana may not have done what the law required them to do, thereby necessitating Federal Court intervention, this School Board did what both State and Federal law required it to do as soon as the Federal census figures became available. It did so publicly, openly, and in good faith. It decided to maintain the existing multi-member district system solely because a substantial majority of the Board felt that in a Parish wide school system, the members of the Board should have to be responsible at the ballot box to as many people as possible and because of their conviction that persons elected from single-member districts tended to overlook or disregard the needs of the system as a whole and were interested only in what would be done in their small individual district. This plan of reapportionment was submitted to the Attorney General of the United States in accordance with the 1965 Voting Rights Act in order that he could carry out his sole function under that Act, i.e., to determine whether or not this reapportionment plan discriminated against minority citizens. He held that it did not. Consequently, we respectfully suggest that decisions of this Court in cases such as *East Carroll*, etc. are not applicable to this case, there has been no intervening clear and significant change in the law with respect to the facts and law of this case, and the Court of Appeals erred in reversing the District Court's application of the doctrines of res judicata and collateral estoppel to this case.

With regard to the second direction on remand to the District Court, the issue of "manifest injustice", we

would suggest to the Court that an equally "manifest injustice" occurs when these citizens who have relied on the highest legal officer of the United States and a decision of the United States District Court and the Court of Appeals, and gained an elective public office after relying on those decisions, are divested of their office by the Federal Courts in a second law suit involving the identical issues, plaintiffs and defendants. It is difficult, at best, to get good qualified citizens to run for local public office (which pays practically nothing) in this day and time. When they are faced with the total instability in government caused by constant recurring law suits changing the election procedure, redesigning their districts, and throwing them out of office, it may become virtually impossible to get good qualified candidates. Some other school boards in Louisiana are in court for the second time, not from being reversed on appeal, but simply because the plaintiffs are not satisfied with the single-member district plan that the District Court may have ordered. At some point, we must return to stability in the judicial process and stability in local government. Petitioners respectfully suggest that now, in this case, is that time and that the decision of the Court below should be reversed and the original decision of the District Court maintained.

We would also respectfully suggest that in view of the very recent action of the 1977 Louisiana Legislature ordering this Board to reapportion itself in single-member districts in time for the 1982 elections, based upon the 1980 Federal census, Act 122 of 1977, it would be a grave "manifest injustice" to now divest these

elected School Board members of their term of office when the plaintiffs will obtain the single-member districts which they desire at that time. Petitioners would therefore also suggest, alternatively, that if the lower Court's decision is to be allowed to stand, this petition should be granted and summary direction issued to the Court below and District Court to hold further proceedings in this case in abeyance pending reapportionment to single-member districts based on the 1980 census in accordance with the Legislative directive.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN F. WARD, JR.
Counsel for Petitioners

CERTIFICATE

I, John F. Ward, Jr., counsel for petitioners and a member of the Bar of the United States Supreme Court, do hereby certify that on this 22 day of July, 1977, I served copies of the foregoing petition for writ of certiorari on the attorney of record for respondent herein, Mr. Walter C. Dumas, Suite 214 Taylor Building, 251 Florida Street, Baton Rouge, Louisiana 70801, by mailing three copies of same, postage prepaid, to him at his office.

JOHN F. WARD, JR.

Appendix A

MINUTE ENTRY:
MARCH 12, 1975
WEST, J.

(Title and number omitted.)

This suit is an attack on the constitutionality of the apportionment of the East Baton Rouge Parish, Louisiana, School Board. The apportionment plan, pursuant to which the current School Board members were elected, provides for a twelve member Board to be elected from three multi-member districts. The Parish is divided into three wards. Ward 1 elects seven members; Ward 2 elects 3 members; and Ward 3 elects two members. The plaintiffs contend that the use of multi-member districts dilutes votes of certain designated groups of voters and that therefore the Court should order the implementation of a plan requiring single member districts. Defendants filed a motion to dismiss based upon the contention that the same matter, involving the same parties, had previously been litigated and adjudicated adversely to the plaintiffs, and that that prior decision is res judicata as to this suit. It is that motion which is before the Court.

Briefs have been filed and oral arguments have been heard on this motion. The plaintiffs agree, as indeed they must, that the same issues here involved were determined adversely to them in a prior suit. But they contend that since that decision three of the plaintiffs herein named have been candidates for School Board

office and have been defeated. This, they contend, is proof that the multi-member districts involved are constitutionally infirm. There is no merit to this argument. There is no constitutionally guaranteed right to win an election. The fact that the plaintiff ran and lost does not alter the fact that the same issues here involved were previously heard by the Court and decided adversely to the plaintiffs. Civil Action No. 72–132 on the docket of this Court, entitled "Dr. D'Orsay D. Bryant, et al v. East Baton Rouge Parish School Board, et al," was a class action which made precisely the same allegations found in the present complaint. In that case a temporary restraining order was denied by this Court and the defendants were ordered to answer the plaintiffs' complaint. Before the case could be heard, the plaintiffs appealed to the Fifth Circuit Court of Appeals from this Court's order denying a temporary restraining order, and that Court dismissed the appeal for lack of jurisdiction. Thereafter the defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted. That motion was briefed, and heard by the Court, and the motion was granted, dismissing that suit on July 26, 1972. Plaintiffs again appealed and on February 9, 1973, the Fifth Circuit Court of Appeals affirmed the judgment of this Court. Plaintiffs then applied for a rehearing, en banc, and that petition was denied on March 19, 1973. No application for writs to the United States Supreme Court was taken. All of the plaintiffs in the present suit were plaintiffs in the prior suit either as named plaintiffs or as members of the class represented by the named plaintiffs. The defendants were the same; the attorneys of record were the same;

and the issues were the same. No changes have been made in the apportionment plan since the prior suit was terminated. The plaintiffs may not now re-litigate these same issues. For these reasons:

IT IS ORDERED that defendants' motion to dismiss this suit on the ground of res judicata be, and it is hereby GRANTED, and this suit is hereby DISMISSED.

UNITED STATES DISTRICT JUDGE

Appendix B

Lawrence E. MOCH et al.,
Plaintiffs-Appellants,

v.

EAST BATON ROUGE PARISH SCHOOL BOARD et al.,
Defendants-Appellees.

No. 75-2195.

United States Court of Appeals,
Fifth Circuit

March 11, 1977.

Action was brought challenging the constitutionality of multimember districts used in apportioning a parish school board. The United States District Court for the Middle District of Louisiana, E. Gordon West, J., dismissed on the ground of res judicata and plaintiffs appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that if a change in law had occurred regarding the constitutionality of multimember districts since the dismissal of the earlier cause of action against the school board, and application of traditional res judicata principles would cause manifest injustice, neither bar, nor collateral estoppel would preclude the action.

Reversed and remanded.

1. Courts 406.6(3)
Federal Civil Procedure 1755

Generally, party cannot base motion to dismiss for

failure to state claim on which relief can be granted on res judicata, but that doctrine must be pleaded as affirmative defense; however, if trial court has treated motion to dismiss as one for summary judgment, its dismissal on ground of failure to state claim is not reversible error. Fed.Rules Civ.Proc. rule 12(b)(6), 28 U.S.C.A.

2. Judgment 217

Evidence occurring subsequent to judgment could not alter finality of judgment.

3. Judgment 540, 634

Term "res judicata," in its broadest sense, covers four distinct types of preculsion: bar, merger, collateral estoppel and direct estoppel.

See publication Words and Phrases for other judicial constructions and definitions.

4. Judgment 713(2)

Under doctrine of bar, judgment in prior suit between same parties bars second suit on same cause of action not only as to all matters offered at first proceeding, but also as to all issues that could have been presented either for or against recovery.

5. Judgment 720

Collateral estoppel precludes relitigation of only those issues actually litigated in original action, whether or not second suit is based on same cause of action.

6. Judgment 739

Generally, postjudgment change of circumstances,

either factual or legal, does not alter judgment's effect as bar to later actions based on same cause of action.

7. Judgment 540, 634

Doctrines of bar and collateral estoppel do not constitute absolute from which court may never stray, even when mechanical application would result in manifest injustice, but rather, occasional adoption of exception to finality rule when public policy so demands does not undermine its general effectiveness.

8. Judgment 739

Neither bar, nor collateral estoppel would preclude action challenging constitutionality of multimember districts used in apportioning parish school board despite judgment in prior action finding apportionment of that school board constitutional, if change in law had occurred regarding constitutionality of multimember districts since dismissal of earlier action and if application of traditional res judicata principles would cause manifest injustice.

Appeal from the United States District Court for the Middle District of Louisiana.

Before MORGAN and GEE, Circuit Judges, and HUNTER, District Judge*.

LEWIS R. MORGAN, Circuit Judge:

Plaintiffs Lawrence Moch, Press Robinson, and George Eames appeal the dismissal of their action chal-

* Senior District Judge for the Western District of Louisiana, sitting by designation.

lenging the apportionment of the East Baton Rouge Parish School Board [hereinafter Board]. After obtaining 1970 federal census figures, on October 14, 1971, the Board voluntarily reapportioned itself in order to comply with "one-man one-vote" requirements articulated in *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) and progeny. The Board submitted its reapportionment plan to the United States Attorney General, who interposed no objection. On May 17, 1972, plaintiff Press Robinson and others fled a class action[1], pursuant to F.R.Civ. P. 23(b)(2), in which they challenged the constitutionality of the plan. Specifically, plaintiffs alleged that the multimember districts provided for in the reapportionment plan diluted the voting strength of black residents of East Baton Rouge in violation of the Thirteenth, Fourteenth, and Fifteenth Amendments of the United States Constitution. Pursuant to Fed.R.Civ.P. 12(b)(6), the United States District Court of the Middle District of Louisiana dismissed the action for failure to state a claim upon which relief could be granted. The Fifth Circuit Court of Appeals affirmed, without opinion,[2] the district court's order.

[1] Plaintiffs instituted the present action on October 10, 1974. Although plaintiffs did not denominate this claim as a class action, the complaint was otherwise almost identical to that filed in 1972. Again, plaintiffs challenged the constitutionality of the multimember districts in the East Baton Rouge School District. The district

1 Plaintiffs invoked federal jurisdiction pursuant to 28 U.S.C. §§ 1343(3), 2201, 2202 and 42 U.S.C. § 1983.

2 *Bryant v. East Baton Rouge Parish School Board*, 72 3075 (5th Cir. February 9, 1973).

court granted the defendants' motion for dismissal, made pursuant to Fed.R.Civ.P. 12(b)(6),[3] on the ground that the 1972 judgment rendered the present cause of action res judicata. Plaintiffs appealed to this court.

[2] Plaintiffs make only one meritorious argument:[4] that a change in this court's[5] and the Supreme Court's[6] opinions regarding the constitutionality of multimember districts has occurred since the 1972 dismissal. Accord-

3 Generally, a party cannot base a 12(b)(6) motion on res judicata. That doctrine must be pleaded as an affirmative defense. 5 Wright and Miller, Federal Practice and Procedure: Civil §1357, at 604-610 (1st ed. 1969). Yet, if the trial court has treated the 12(b)(6) motion as one for summary judgment, its dismissal under 12(b)(6) is not reversible error. *Larter and Sons, Inc. v. Dinkler Hotel Co.*, 199 F.2d 854, 855 (5th Cir. 1952). Here, the district court held a hearing and treated defendants' motion more like a motion for summary judgment than like a 12(b)(6) motion.

4 Plaintiffs also argue that a change in fact, sufficient to negate the conclusiveness of the prior judgment, has occurred. That is, they contend that two Board elections, in which six blacks have run and lost, have been held since 1972. Prior to the 1972 action no election under the plan had been held; plaintiffs therefore argue that new evidence—the inability of blacks to gain seats on the school board—now exists. This subsequently occurring evidence cannot alter the finality of the 1972 action. 1B Moore's Federal Practice §0.415, at p. 2052 (2nd ed. 1974).

Plaintiffs do not argue that the technical requirements of res judicata were not met nor do they contend that the class in the first action was not adequately represented so as to prevent the conclusive effect of the first judgment; *see*, *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1963). We, therefore, do not consider these issues.

5 *See, e. g., Zimmer v. McKeithan*, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom. East Carrol Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976). *See generally*, Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 Ga. 1.Rev. 353 (1976).

6 *See, e. g., White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

ingly, plaintiffs argue, had the district court in the 1972 action employed the present constitutional standards of multimember districts, it would not have dismissed the case.

[3–5] The term "res judicata," in its broadest sense, covers four distinct types of preclusion: bar, merger, collateral estoppel, and direct estoppel. *See* Restatement of Judgments § 45, Comments (a), (b), (c) and (d) at 175 76 (1942). In the present case, we concern ourselves with the application of bar and collateral estoppel. Under the doctrine of bar, a judgment in a prior suit between the same parties bars a second suit on the same cause of action not only as to all matters offered at the first proceeding, but also as to all issues that could have been presented either for or against recovery. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 319, 47 S.Ct. 600, 71 L.Ed. 1069 (1927). *See* Restatement of Judgments 48 (1942). Collateral estoppel, however, precludes relitigation of only those issues actually litigated in the original action, whether or not the second suit is based on the same cause of action. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955). *See* Restatement of Judgments § 68 (1942). Here, defendants argue primarily that the 1972 judgment bars plaintiffs' present action in that both suits are based on the same cause of action. Defendants note that because the same issues presented in this suit were argued and determined at the first proceeding, collateral estoppel also precludes litigation of plaintiffs' claims.

[6] Generally, a postjudgment change of circumstances, either factual or legal, does not alter that

judgment's effect as a bar to later actions based on the same cause of action. 1B *Moore's Federal Practice*, §0.415, at p. 2051 52 (2nd ed. 1974).[7] Yet, courts have occasionally rejected strict application of bar and estoppel principles when their use would violate an overriding public policy or result in manifest injustice. *E. g., Dore v. Kleppe*, 522 F.2d 1369 (5th Cir. 1975)(res judicata is a principle of public policy and should be applied so as to give rather than deny justice); *Schlegel Manufacturing Co. v. USM Corp.*, 525 F.2d 775 (6th Cir. 1975), *cert. denied*, 425 U.S. 912, 96 S.Ct. 1509, 47 L.Ed.2d 763 (1976); *La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc.*, 495 F.2d 1265 (2nd Cir. 1974); *Kinnear-Weed Corp. v. Humble Oil and Refining Co.*, 403 F.2d 437 (5th Cir. 1968) (*en banc*); *Spiller v. Hankin*, 88 U.S.App.D.C. 206, 188 F.2d 35 (1951). *See generally* 1B *Moore's Federal Practice*, § 0.405[1]. Courts on some occasions have concluded that a change in the applicable law occurring after the first suit is a circumstance that renders application of bar or estoppel in a second suit inappropriate. *E. g., Texaco v. Hickel*, 141 U.S.App.D.C. 203, 437 F.2d 636 (1970); *Griffin v. State Board of Education*, 296 F.Supp. 1178 (E.D.Va. 1969). Although the Supreme Court has not held explicitly that a change in law negates the finality of a prior suit in a context like that in this case, it has indicated some ap-

7 Moore indicates that while the same rule is applicable generally to estoppel, some jurisdictions have held that collateral estoppel, unlike bar, will not preclude a later suit brought after a change in the relevant law, if injustice would result. 1B Moore's Federal Practice, § 0.448, at 4731 34 (2nd ed. 1974). We do not decide, here whether such a distinction is generally valid.

proval for the proposition. In *State Farm Mutual Automobile Insurance Co. v. Duel*, 324 U.S. 154, 65 S.Ct. 573, 89 L.Ed. 812 (1945), that Court stated, as an alternate ground for its holding, that "res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation." 324 U.S. at 162, 65 S.Ct. at 577.

This panel has discovered three pertinent cases that involve the effect of a change in law on the conclusiveness of a prior judgment in which constitutional claims are involved.[8] In *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), the Supreme Court, in a suit attacking the apportionment of Indiana's state legislature, rejected the defendant's argument that an earlier finding of validity foreclosed a later constitutional attack on the plan:

> Nor can we accept defendant's argument that the statutory plan was beyond attack because the District Court had held in 1965 that at that time the plan met the 'substantial equality' test of Reynolds. *Stout v. Bottorff*, 249 F. Supp. 488 (SD Ind. 1965). . . . Here, the District Court did not order reapportionment as a result of population shifts since the 1965 Stout decision, but *only because the*

8 While our research has revealed no case from the circuit directly on point, we have discovered an order by this court, which, on July 29, 1976, directed the United States District Court of the Western District of Louisiana, in an action challenging the election districts of the Rapides Parish Police Jury, to effect a legal election under "present facts and law," freed from the restraint of this court's prior view of the law in an earlier challenge to the jury. *Parnell v. Rapides Parish School Board.* F.Supp. (W.D.La.1976).

> *disparities among districts which were thought to be permissible at the time of that decision had been shown by intervening decisions of this Court to be excessive.*

Id. at 162, 63, 91 S.Ct at 1879, 29 L.Ed.2d at 387 (emphasis added).

In *Bronson v. Board of Education*, 525 F.2d 344 (6th Cir. 1975), cert. denied, 425 U.S. 934, 96 S.Ct 1665, 48 L.Ed.2d 175 (1976), the Sixth Circuit Court of Appeals confronted an allegation of a change in applicable law occurring after a school desegregation decision, *Deal v. Board of Education*, 369 F.2d 55 (6th Cir. 1961), *cert. denied*, 389 U.S. 847, 88 S. Ct. 39, 19 L.Ed.2d 114 (1967), to which defendants argued that plaintiffs in a later case were bound. Examining the appropriateness of applying collateral estoppel to the second action, the court held that the alleged change of law was not sufficient to avoid preclusion of issues litigated in the first action. Implicitly, if a significant change had occurred, public policy would prevent application of traditional estoppel principles, in that "both [estoppel and bar] are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice." *Bronson*, 525 F.2d at 349, citing *Tipler v. E.S. duPont de Nemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971).

Finally, in *Griffin v. State Board of Education*, 296 F. Supp. 1178 (E.D.Va. 1969), the United States District Court of the Eastern District of Virginia rejected application of bar and estoppel principles to an action challenging the constitutionality of state support of private schools where two intervening Supreme Court decisions had struck down plans similar to that approved in the prior case.

> [The intervening Supreme Court decisions were] a substantial change in the law and ended further viability of our decision. Now to continue its efficacy would be unjust to those initally and now affected by that order.
>
> Again, when as here private litigation has extensive implications of public import, the rule of res judicata or estoppel is not allowed to stultify reassessment of the prior decision. The public interest supersedes the private interest.

Id. at 1182.

[7, 8] This court is well aware of the value that the bar and estoppel doctrines serve in achieving a finality to litigation and in preventing harassment of a party and a waste of the court's resources through multiplicitous law suits. We are unwilling to hold, however, that they constitute an absolute from which we must never stray, even when a mechanical application would result in manifest injustice. Rather, we believe that the occasional adoption of an exception to the finality rule when public policy so demands does not undermine its general effectiveness. In the present case, plaintiffs claim that the state has violated certain fundamental rights by maintaining multimember voting districts that unconstitutionally dilute their vote. The court below granted defendants' motion to dismiss on the basis of the res judicata effect of a 1972 decision. Now plaintiffs aver that through an intervening change in law in both the Supreme Court and this circuit, present law would obtain a different result than that reached in the 1972

judgment of dismissal. We find merit in plaintiff's contention that the application of traditional finality principles, after a change in the appropriate law, could contravene public policy, especially in light of the importance of their constitutional claim and of the fact that plaintiffs never really had their day in court in 1972 since that complaint was dismissed merely on a 12(b)(6) motion. To apply such doctrines after a significant change in law governing the issue of multimember districts has occurred could mean that the East Baton Rouge Parish School Board would be allowed to continue *ad infinitum* a constitutionally infirm system outlawed everywhere else. We do not feel compelled to determine in this case whether a supervening change in the case law renders a subsequent claim a different cause of action, thus making collateral estoppel rather than bar applicable, or whether such a change constitutes an "altered circumstance" that renders bar, itself, inapplicable. If public interest in giving effect to changes in this important area of the law outweighs the Board's interest in finality under one doctrine, one would logically conclude that it would compel the same result under the other rule of preclusion. Therefore, we direct the district court to determine on remand: (1) whether a change in the applicable law clearly has occurred since 1972, thus rendering incorrect the legal principles under which the district court determined the case in 1972 and (2) assuming such a change has occurred, whether application of traditional res judicata principles would cause manifest injustice. If it answers both questions in the affirmative, neither bar nor collateral estoppel should preclude the present action.

REVERSED and REMANDED.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1414

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Petitioners,

VERSUS

LAWRENCE MOCH, ET AL.,
Respondents.

PETITION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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IN THE
SUPREME COURT OF THE UNITED STATES
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NO.

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Petitioners,

VERSUS

LAWRENCE MOCH, ET AL.,
Respondents.

PETITION IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Respondents pray that Writ of Certiorari be denied.

STATEMENT OF THE CASE

The East Baton Rouge Parish School Board consists of all white members. However, one black has served as a member of the East Baton Rouge Parish School Board having been appointed by the Governor to serve an unexpired term. When this black member ran for the seat, he was defeated by a white.

The East Baton Rouge Parish School Board has a history of discriminatory practices. Additional relief had to be sought in federal court to implement the desegregation of public schools. Further, the East Baton Rouge Parish School Board still maintains a school named after the Confederate General Robert E. Lee.

Black elected officials and community leaders voiced strong objections to the re-apportionment plan by the School Board at a meeting held at the School Board Office. However, no objection was lodged with the United States Attorney General's Office.

It is true that a white incumbent democratic member of the Legislature from East Baton Rouge was defeated in the General Election by a republican, but it should also be noted that this area contains a high percentage of registered republicans and this republican has won re-election each time.

REASON FOR REFUSING THE WRIT

The black population according to the census data is concentrated in three (3) areas, one of which is outside of the City of Baton Rouge.

This suit was filed more than two (2) years after the first suit for re-apportionment was dismissed. Further, it should be

noted that there has been two (2) elections under the School Board's apportionment plan since the dismissal of the first suit. A total of six (6) blacks have run for the School Board, all have lost. Four (4) ran in the 1972 School Board election, and two (2) ran in the 1974 School Board election. No black has ever been elected to the East Baton Rouge Parish School Board since reconstruction.

In the 1974 election during the second primary, a white candidate opposed a black candidate in the run-off. The black candidate had the active support of the Mayor-President of the City of Baton Rouge and East Baton Rouge Parish and the Governor of the State of Louisiana. The black candidate was defeated. Most significantly, the result showed the electorates voted along racial lines. The predominately black precincts voted heavily for the black candidate, but the heavily white majority effectively cancelled out those votes. Election returns by precincts were presented to the District Court accompanying the trial brief filed by plaintiffs-appellants. The City-Parish Council of East Baton Rouge Parish has been apportioned into single-member districts since 1972. The black candidate, Lawrence E. Moch, a plaintiff herein, lives in one of the single-member districts of the City-Parish Council. If the School Board had been divided into single-member districts, Lawrence E. Moch would have been elected to the School Board. Two (2) of the other four (4) black candidates in the 1972 election lead white candidates in the first primary, but were defeated in the second primary.

In the present suit it was also alleged that the School Board was racially gerrymanded, the voting practices and procedures of the State of Louisiana and the Parish of East Baton Rouge tend to compound and multiply the racially discriminatory effects of the multi-member districts, that LSA-R.S. 18:358 provided for a majority rather than a plurality requirement in the primary elections and the white majority in a multi-member

district thus effectively prohibits any black candidate from gaining election, the multi-member district in combination with the above mentioned procedure deny blacks of East Baton Rouge access to the political force or control over members of the School Board because the effect of their votes is cancelled out by well-established and hostile interest groups in other parts of the parish in which these areas are located. None of these factors were alleged in the first suit. It was impossible to allege factors pertaining to an election under the apportionment plan in the first suit because there was no election held before the filing of the first suit. Plaintiffs did not have an opportunity to present evidence during the first suit. *William v. Murdock*, 330 F.2d 745.

Some of the facts alleged in this suit could not have been alleged in the prior suit. Therefore, res judicata is not applicable to the new matters alleged. *Parker v. McKeithen*, 488 F.2d 553; *Ottomano v. U.S.*, 468 F.2d 269, cert. den., 383 U.S. 919; and *Peabody Coal Co. v. Erwin*, 326 F.Supp. 1005.

Neither res judicata nor collateral estoppel gives conclusive force to a prior adjudication on facts which are different from those involved in the subsequent action. *Moore's Federal Practice*, Vol. 1B 0.422(4). *Bourns, Inc. v. Allen-Bradley Co.*, 480 F.2d 123, cert. den., 414 U.S. 1094. These new factors present new issues. Therefore, these issues could not have been determined. *Rhodes v. Jones*, 351 F.2d 884, cert. den., 383 U.S. 919.

The cases of *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), and *White v. Regester*, 412 U.S. 755 (1973), were not decided at the time of the filing of the first suit. The courts have vacated and reminded earlier ruling in view of new court decisions. *Wallace v. House*, 538 F.2d 1138, 5th Cir. (1976).

The Supreme Court has held that all citizens are entitled to equal opportunities to participate in the political process and to elect legislators of their choice. *McGill v. Gadsden County Commission*, 335 F.2d 277, 5th Cir., (1976).

Plaintiffs in a voting dilution case have the burden of showing that their group has been denied access to the political process equal to the access of other groups. *Chapman v. Meier*, 420 U.S. 1 (1975). In *Zimmerman v. McKeithen*, 485 F.2d 1297, 5th Cir. (1973), and *East Carroll Parish School Board v. Marshall*, supra, the test for setting standards that will control voting diluting cases was enunciated. Plaintiff must show where a majority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particular interest, a tenuous state policy underlined the preference for multi-member or at-large districts, or that the existence of past discrimination in general prelude the effective participation in the election system, a strong case of dilution is made. The fact of dilution is established from proof of the existence of an aggregate of these facts. The Supreme Court recently pronounced in *White v. Regester*, supra, however that all these facts need not be proven in order to obtain relief. The East Baton Rouge Parish School Board has a policy of favoring multi-member districts.

The courts have repeatedly held that the existence of past racial discrimination is relevent to a decision whether at-large electorate district unconstitutionally dilutes the voting strength of blacks. *Wallace v. House*, supra. In *Wallace v. House*, supra, the Fifth Circuit Court of Appeals held that the general rule is that single-member districts ought to be preferred. *Connor v. Finch*, 419 F.Supp. 1072, 1976 S.D. Miss.

It is true that the 1977 Legislature ordered this Board to re-apportion itself into single-member districts in time for the 1982 election based upon the 1980 federal census,

Act 122 of 1977. However, the Legislature can change or repeal this act at the next Legislature Session. Further, the act is subjected to judicial attack because of being special legislation which is prohibited under the State Constitution.

The Fifth Circuit Court of Appeals was correct when it held that if a change in law has occurred regarding the constitutionality of multi-member districts since the dismissal of the earlier cause of action against the School Board, an application of the traditional res judicata principle would cause manifest injustice, neither bar nor collateral estoppel would prelude the action.

CONCLUSION

We respectfully submit that for the foregoing reasons that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Joseph A. Gladney pr m.a.s
JOSEPH A. GLADNEY

Walter C. Dumas pr m.a.s
WALTER C. DUMAS

CERTIFICATE OF SERVICE

We, Joseph A. Gladney and Walter C. Dumas, counsel for respondents, and Joseph A. Gladney, member of the Bar of the Supreme Court of the United States, do hereby certify that on this 23rd day of August, 1977, copies of the foregoing Petition for Writ of Certiorari have been served on the attorney for petitioner herein, Mr. John F. Ward, Quad 1, Suite C, 1111 South Foster Drive, Baton Rouge, Louisiana 70806, by mailing three (3) copies of same, postage prepaid, to him at his mentioned address.

Joseph A. Gladney pr m.a.s
JOSEPH A. GLADNEY

Walter C. Dumas pr m.a.s.
WALTER C. DUMAS